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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

SAUK-SUIATTLE INDIAN TRIBE,

NO. 2:21-cv-01041-BJR

Plaintiff,

PLAINTIFF'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

**CITY OF SEATTLE and SEATTLE
CITY LIGHT**, a subdivision of the
City of Seattle,

Respondents.

INTRODUCTION

Respondents have moved the court to dismiss plaintiff's complaint on various grounds. For the reasons set forth herein such motion should be denied.

ARGUMENT

1. Respondents mischaracterize the basis of plaintiff's claims. That certain territorial acts for Oregon and Washington were repealed in 1873 and 1933 respectively have no bearing on this case, since Washington had by then already incorporated their provisions as matters of Washington state law. Plaintiff's claims do not arise directly under now repealed federal law, rather, the claims are based upon the incorporation by reference of then-existing federal law into state law.

First, respondents argue that certain prohibitions against complete stream blockage requirements in Territorial acts (respondents' exhibits A and B) which were incorporated by

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1 reference in the Washington State Constitution (Wash. Const. Art. XXVII, § 2) were repealed
 2 and consequently no longer in effect. See ECF No. 11, pp. 5-10.

3 In support of such argument, respondents cite to various statutes which they say
 4 rendered such requirements repealed. In particular, respondents rely upon portions of an 1873
 5 Congressional Act (ECF 4, 5, Respondents' exhibits C and D) consolidating the general laws
 6 of the United States into the Revised Statutes which was later to be denominated the United
 7 States Code. There are two key problems with respondents' reliance upon such enactment.

8 First, the 1873 Act, like the later 1933 act relied on by respondents, was an effort to
 9 codify all general laws of the United States, while repealing "obsolete" provisions. As to the
 10 Act establishing Oregon Territory, of course in 1873 its provisions were obsolete and repealed
 11 as a law of the United States subject to placement in the Revised Statutes, since Oregon obtained
 12 statehood in 1859. As to any repeal of provisions of the 1853 Washington territorial act, the
 13 1873 repeal asserted by respondents expressly *exempted* from repeal provisions of
 14 Congressional Acts made prior to 1873 which were not general to the United States but rather
 15 were peculiarly local in nature. *See*, §5596, ECF 11-5, p. 3. The probation of stream blockages
 16 in Section 12 of the 1853 Washington Territorial Act was peculiarly local—Washington being
 17 the sole jurisdiction of the United States which in 1873 had such a prohibition.

18 Second, Section 1952 of the 1873 Act expressly *preserved* the continuing validity of
 19 Section 12, and other sections of the Washington Territorial Act:

20 Sec. 1952. The laws now in force in the Territory of Washington, by virtue of
 21 the legislation of Congress in reference to Oregon, when that State was a
 22 Territory, which were enacted and passed subsequent to the first day of
 23 September, eighteen hundred and forty-eight, applicable to the Territory of
 Washington, together with the legislative enactments of Oregon, while a
 Territory, enacted and passed prior to March 2, 1853, and not inconsistent with
 the provisions of this Title, and applicable to the Territory of Washington, are

1 continued in force in that Territory until repealed or amended by future
 2 legislation, unless such laws have been repealed or amended by legislation
 3 susequent to the second day of March, eighteen hundred and fifty-three.

4 ECF 11-4, p. 20 (Attachment C of Respondents' Motion to Dismiss). That Act, which had by
 5 then already been incorporated by reference into the Washington State Constitution and the
 6 State's Enabling Act (Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, 684 [§ 24] [1889], ECF 11-
 7 6), was not repealed from the Revised Statutes until 1933 as respondents correctly state.
 8 However, Congress was explicit when it repealed Section 1952 that the obsoleteness of Section
 9 1952 was merely because, upon Statehood, Congress lacked the authority to determine the laws
 10 of the State of Washington.

11 This section provided that certain laws should continue in force in the territory
 12 of Washington. When the territory of Washington became one of the States of
 13 the Union, Congress lost its power to determine what laws should be in force
 14 therein, other than the general body of Federal law applicable to all of the States,
 15 and this section became obsolete at that time.

16 Congressional repeal thus had no effect on the applicability of Section 12 of the Washington
 17 Territorial Act through its incorporation via state law. Quite to the contrary, Congress expressly
 18 recognized the matter as a question of purely state law. Consequently, the respondents are
 19 arguing against themselves. The restriction against stream blockages, having been adopted as
 20 the state law of Washington prior to its decades-later repeal, and Congress having deemed the
 21 federal statute unworthy in 1933 of placement in the United States Code since it was obsolete,
 22 subject to repeal, and no longer a law of the United States—Washington having decades earlier
 23 obtained statehood—this case is one purely of determining the applicability of a Washington
 24 *state* law. Those federal laws incorporated into Washington state law no longer even raise a
 25 Federal Question for purpose of invoking this court's 28 U.S.C. § 1331 original jurisdiction.

1 That Washington courts deem the provisions of the Washington Territorial Act to
2 remain to be of continued vitality as a matter of Washington state law is demonstrated by State
3 v. Svenson, 104 Wn. 2d 533 (1985). There, the question presented was whether the State of
4 Washington possessed jurisdiction over an offense committed on the Oregon side of the
5 Columbia River in light of § 1950 of the 1853 Washington Territorial Act that provided:

6 Sec. 1950. The State of Oregon and the Territory of Washington shall have
7 concurrent jurisdiction over all offenses committed on the Columbia River,
where that river forms a common boundary between the State and Territory.

8 Act of March 2, 1853, Ch. 90, §12. The Washington State Supreme Court did not resolve the
9 issue based upon the territorial Act, since the issue was addressed in a Compact between
10 Washington and Oregon. However, the state's supreme court certainly did not treat the
11 territorial provision as though it was no longer in effect as a law of the state.

12 An alternative basis for dismissal argued by respondents is that Washington has, on its
13 own, “altered or repealed” the anti-stream blockage provision it constitutionally adopted by
14 enacting an 1889 statute imposing criminal penalties upon those who completely blocked fish-
15 bearing streams:

16 Sec. 8. Any person or persons now owning or maintaining, or who shall hereafter
construct or maintain any dam or other obstruction across any stream in this state
which any food fish are wont to ascend, without providing a suitable fishway or
ladder for the fish to pass over such obstruction, shall be deemed guilty of a
misdemeanor, and upon conviction thereof, be punished by a fine of not less
than one hundred dollars nor more than two hundred fifty dollars, and said dam
or obstruction may, in the discretion of the court, be abated as a nuisance.

20 See, ECF 11-7, pp. 3-4 (Attachment F of Respondents’ Motion to Dismiss). Plaintiff fails to
21 see how the Washington legislature’s memorialization—or codification—of the anti-stream
22 blockage provision incorporated into the Washington state constitution “repealed” the
23 prohibition such that respondents’ continuing to operate in direct violation of it cannot be the

1 basis for a declaratory judgment action in state court. Ordinarily, constructions in violation of
 2 state laws are a nuisance *per se*. That there is a good faith basis for a declaratory judgment
 3 action in state court is further borne out by current provisions of Washington state law. *See*,
 4 RCW 77.15.320 (Unlawful Failure to Provide, Maintain, or Operate Fishway for Dam or Other
 5 Obstruction); *see also*, RCW 77.57.030 (Fishways Required in Dams, obstructions).

6 Furthermore, defendants citation to Section 16 of the 1889 Act does not expressly
 7 provide for the repeal of Section 12 of the Washington Territorial Act because that act was not
 8 “passed by the legislative assembly of the Territory of Washington.” Rather, Section 12 was
 9 initially passed by the United States Congress, then incorporated into Washington State law not
 10 via the legislative assembly of the Territory of Washington but rather via a special constitutional
 11 convention. The legislature could have mirrored the languaged of the Washington State
 12 Constitution that referenced all laws “in force in the Territory of Washington” but chose rather
 13 to limit the repeal clause to laws passed by the legislative assembly.

14 2. Plaintiff's assertion of a common law claim does not constitute a “collateral
attack on respondent's license”.

15 Nowhere in plaintiff's complaint is it asserted that plaintiff questions the validity of
 16 respondents' license to operate a hydroelectric power generating facility. On the contrary,
 17 plaintiff's complaint—which for purposes of a motion to dismiss is presumed to be true—
 18 asserts that the presence and operation of respondents' dam violates the Washington State
 19 Constitution (ECF 1, p. 20, Amended Complaint ¶ 5.A), that the restriction against stream
 20 blockages in territorial acts were not repealed by the State's admission to the Union (*id.*, ¶ 5.B)
 21 , that complete stream blockages violate Washington common law that was adopted by the
 22 Washington legislature by enactment of Section 4.04.010 of the Revised Code of Washington
 23

1 (Amended Complaint ¶ 5.C) ECF 1, p. 20, and that respondents' dam unreasonably interferes
 2 with plaintiff's enjoyment of its property thereby constituting a nuisance. Id., ¶ 5.D. The mere
 3 fact that respondent's Gorge Dam completely blocks a river does not prevent it from being
 4 *licensed* to produce electricity. But the mere fact that a license is issued by another jurisdiction
 5 does not prevent the application of state laws which provide *greater* or different restrictions
 6 than those imposed by federal law so long as the two are compatible. For example, if
 7 Washington law imposed a requirement that, in order to assure public safety and visibility, all
 8 hydroelectric dams be painted red, that would not constitute an attack on the facility's licensing.
 9 Rather, it would be a mere exercise of the State's police powers to impose greater restrictions
 10 on how the dam is built than are imposed as a matter of federal law, so long as that does not
 11 make it impossible for the facility to be licensed. Since over 50 dams in Washington already
 12 licensed which do not block streams, asking the state court to determine that this dam should
 13 not completely block the stream according to Washington state law, in no way attacks the ability
 14 of the dam to remain licensed. The fact that respondent's dam is "licensed" does not
 15 preclude it nevertheless constituting a nuisance under Washington common law. According to
 16 Washington law,

17 [W]hen proper authority authorizes the operation of a lawful business in a certain area,
 18 such business does not constitute a nuisance in a legal sense, but it may become such if
 19 it is conducted in such an unreasonable manner that it substantially annoys the comfort
 20 or repose of others or essentially interferes with the enjoyment of property[.]

21 Brusland v. Oak Theater, 42 Wn. 2d 346 (1953).

22 Despite plaintiff's well-pleaded complaint never challenging the validity of defendant's
 23 license, defendant implores the court to "look past a plaintiff's claimed causes of action and

1 artful attempts to avoid the FPA's 'strict jurisdictional limit.'" However, the exclusive
 2 jurisdiction provisions of the FPA have not been found to apply to claims under state law.

3 The Ninth Circuit has found that the jurisdictional prescriptions of the FPA provides for
 4 a more specific route of appeal than other federal claims and thus prevent a plaintiff from
 5 bringing claims under federal laws with less specific routes of appeal. *see Cal. Save Our
 6 Streams Council, Inc. v. Yuetter*, 887 F.2d 908, 911 (9th Cir. 1989). It is clear that in the Ninth
 7 Circuit, attempts to bring claims under other federal laws including NEPA, AIRFA, and ESA
 8 must give way to the FPA where "the practical effect of the action in district court is an assault
 9 on an important ingredient of the FERC license." *Id.* at 912. However, these cases do not
 10 provide that the exclusive jurisdiction prescription of the FPA can provide Congress with the
 11 authority to create jurisdictional prescriptions under state law claims. The Supreme Court has
 12 warned it does not find that Section 313 of the FPA:

13 ...suggest that the Federal Power Act endowed the Commission of the Court of
 14 Appeals with the authority to decide any issues of state law if such law were
 15 deemed controlling, or that had the Court of Appeals undertaken to do so, such
 a determination would have foreclosed re-examination of such a decision in
 other proceedings.

16 [City of Tacoma v. Taxpayers of Tacoma](#), 357 U.S. 320, 241 (1958) (J. Harlan, concurring).

17 3. The 1981 Settlement Agreement does not preclude Sauk-Suiattle's Claims

18 The Agreement applies only to claims that arise "from the effects of the Project, as currently
 19 constructed, on fisheries." Here, while plaintiff's claims may ultimately have a fisheries effect the
 20 claims do not arise from the effects on fisheries but arise from a violation of state law. The parties
 21 to the settlement agreement explicitly reserved that "Nothing in this Agreement precludes the
 22 City...from complying with their obligations under...any other laws applicable to the Project."

23 4. The doctrine of primary jurisdiction is inapplicable to this cause.

Primary jurisdiction is a prudential doctrine that permits courts to determine "that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." In evaluating primary jurisdiction, [courts] consider "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction. Rather, the doctrine is reserved for a "limited set of circumstances" that "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency."

Astiana v. Hain Celestial Group, Inc., 783 F.3d 753, 759 (9th Cir. 2015) (internal citations omitted). Plaintiff's claims present an ordinary claim of statutory interpretation that does not require the expertise of FERC. Furthermore, defendant's claim that "FERC has primary jurisdiction over the 'critical issue' of whether the Gorge Dam impairs fish passage." However, the Ninth Circuit has already held that in the context of a 12(b)(6) motion to dismiss there is no "need to resolve an issue" under primary jurisdiction because the court must accept the plaintiff's allegations as true and thus whether the Gorge Dam impairs fish passage must be resolved in plaintiff's favor. See Cost Management Services v. Washington Nat. Gas, 99 F.3d 937, 949 (9th Cir. 1996)

5. The claims raised in plaintiff's complaint are not preempted by the Federal Power Act.

The Supreme Court has identified two ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when Congress's preemptive intent is implicit in the relevant federal law's structure and purpose.

1 Many federal statutes contain provisions that purport to restrict their preemptive effect.
 2 These “savings clauses” make clear that federal law does not preempt certain categories of state
 3 law, reflecting Congress’s recognition of the need for states to “fill a regulatory void” or
 4 “enhance protection for affected communities” through supplementary regulation. Sandi
 5 Zellmer, *When Congress Goes Unheard: Savings Clauses’ Rocky Judicial Reception*, in
 6 Preemption Choice: The Theory, Law, and Reality of Federalism’s Core Question 144, 146
 7 (William W. Buzbee, ed., 2009). Some courts and commentators have labeled these clauses
 8 “anti-preemption provisions.” Some courts have addressed such provisions in the context of
 9 defendants’ attempts to remove state law actions to federal court. Specifically, certain courts
 10 have relied on anti-preemption provisions to reject removal arguments premised on the theory
 11 that federal law “completely” preempts state laws concerning the relevant subject. In Bernhard
 12 v. Whitney National Bank, for example, the U.S. Court of Appeals for the Fifth Circuit relied
 13 on an anti-preemption provision in the Electronic Funds Transfer Act to reject a defendant-
 14 bank’s attempt to remove state law claims involving unauthorized funds transfers to federal
 15 court. 523 F.3d 546, 548 (5th Cir. 2008). A number of federal district courts have also adopted
 16 similar interpretations of other anti-preemption provisions. See Ervin v. JP Morgan Chase Bank
 17 NA, No. GLR-13-2080, 2014 WL 4052895 at *3 (D. Md. Aug. 13, 2014); Palacios v. IndyMac
 18 Bank, FSB, No. CV 09-04601, 2009 WL 3838274 at *4 (C.D. Cal. Nov. 13, 2009); Perkins v.
 19 Johnson, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008).

20 Section 27 of the Act of June 10, 1920 expressly provided that:

21 Nothing contained in this chapter shall be construed
 22 as affecting or intending to affect or in any way to
 23 interfere with the laws of the respective States[.]

Such an exclusionary clause also appears in the 1986 amendments to the Federal Power Act:

Sec. 17. Savings Provisions.

- (a) In General.—Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribes, or any other entity or individual. Nor shall any provision of this Act--
 - (1) Affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource;
 - (2) Alter, amend, repeal, interpret, modify, or be in conflict with any interstate compacts made by the States;
 - (3) Alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related rights;
 - (4) Alter, expand, or create rights to use transmission facilities owned by the Federal Government;
 - (5) Alter, amend, repeal, interpret, modify, or be in conflict with, the Treaty rights or other rights of any Indian tribe;
 - (6) Permit the filing of any competing application in any relicensing proceeding where the time for filing a competing application expired before the enactment of this Act; or
 - (7) Modify, supersede, or affect the Pacific Northwest Electric Power Planning and Conservation Act.

The Supreme Court has made clear that Congress's purpose is the "ultimate touchstone" of its statutory analysis. The Court's analysis of Congress's purpose has at times been informed by a canon known as the "presumption against preemption," which instructs that federal law should not be read as preempting state law "unless that was the clear and manifest purpose of Congress." Section 3 of the Congress' 1986 amendments to the Federal Power Act clearly demonstrates a Congressional purpose to protect and enhance fish and wildlife:

Section 3. Environmental Considerations in Licensing.

- (a) Purposes of License.—Section 4(e) of the Federal Power Act is amended by adding the following at the end thereof: “In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”

1 16 U.S.C. § 797. Not only does the Federal Power Act expressly not preempt State laws by
 2 virtue of a savings clause, the requirement that dams within Washington not block the passage
 3 of fish is entirely consistent and compatible with Congress purposes embodied in that Act.

4 The United States Supreme Court has identified two subcategories of implied
 5 preemption. *Field preemption* occurs when a pervasive scheme of federal regulation implicitly
 6 precludes supplementary state regulation, or where states attempt to regulate a field where there
 7 is clearly a dominant federal interest. *Conflict preemption* occurs when simultaneous
 8 compliance with both federal and state regulations is impossible, or when state law poses an
 9 obstacle to the accomplishment of federal goals. Given that all of the over 50 hydroelectric
 10 dams in Washington licensed by the Federal Energy Regulatory Commission—except one—
 11 already have fish passage measures at their dams, it cannot be said that compliance with
 12 Washington’s fish passage requirement makes it “impossible” to comply with FERC’s federal
 13 licensing requirements. There is no issue of implied federal preemption in this case.¹

14 In determining whether federal law preempts state law, the purpose of Congress is the
 15 “ultimate touchstone” of its statutory analysis. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)
 16 (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Congress’s intent is
 17 discerned “primarily” from a statute’s text. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).
 18 The Court has also noted the importance of statutory structure and purpose in determining how
 19 Congress intended specific federal regulatory schemes to interact with related state laws. *Id.*

20
 21 ¹ Federal law impliedly preempts state law when it is impossible for regulated parties to
 22 comply with both sets of laws. *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43
 23 (1963). Federal law impliedly preempts state laws that pose an obstacle to the “full purposes
 and objectives” of Congress.

1 In evaluating congressional purpose, the Court has at times employed a canon of
 2 construction referred to as the “presumption against preemption,” which instructs that federal
 3 law should not be read to preempt state law “unless that was the clear and manifest purpose of
 4 Congress.” Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). The presumption against
 5 preemption has traditionally been justified on the grounds that it promotes respect for
 6 federalism and state sovereignty. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 533 (1992).
 7 Prominent textualists have expressed suspicion about substantive canons’ legitimacy. *See Amy*
 8 *Coney Barrett, Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 1 23-24 (2010)
 9 (“Substantive canons are in significant tension with textualism . . . insofar as their application
 10 can require a judge to adopt something other than the most textually plausible meaning of a
 11 statute.”); *see also* John F. Manning, Textualism and the Equity of the Statute, 101 COLUM.
 12 L. REV. 1, 124 (2001) (“If textualists believe . . . that statutes mean what a reasonable person
 13 would conventionally understand them to mean, then applying a less natural . . . interpretation
 14 is arguably unfaithful to the legislative instructions contained in the statute.”); *and see* Antonin
 15 Scalia, *A Matter of Interpretation: Federal Courts and the Law* 28 (1997). *See also* Antonin
 16 Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 293 (2012) (“[T]he
 17 [presumption against preemption] . . . ought not to be applied to the text of an explicit
 18 preemption provision . . . there is no justification for not taking Congress at its word—*i.e.*,
 19 giving its words their ordinary, fair meaning.”). In Virginia Uranium, Inc. v. Warren, 587 U.S.
 20 _ (2019), Justice Gorsuch authored an opinion joined by Justices Thomas and Kavanaugh in
 21 which he emphasized that any evidence of Congress’s preemptive purpose must be sought in a
 22 statute’s text and structure. (Gorsuch, J., lead opinion) (slip op., at 14-15).

23

1 Certainly, there may be discrete areas where the Federal Power Act must prevail over
 2 conflicting principles of State law. However, this is not a case, where a law applicable in the
 3 State is irreconcilable with requirements of the Federal Energy Regulatory Commission. For
 4 example, if the Washington Utilities and Transportation Commission adopted rates and
 5 regulations applicable to electricity generated by federally licensed power generating facilities
 6 that contradicted federal rates such that it became impossible for licensees to comply with both
 7 sets of laws, such state regulations might fail. However, this is not such a case.

8 Maryland Public Service Commission v. Talen Energy Marketing LLC (U.S. Supreme
 9 Ct. No. 14-614), April 9, 2016), is essentially on all fours and is dispositive of respondent's
 10 argument. There, the energy company successfully asserted that Maryland's power pricing
 11 program impermissibly interfered with FERC's exclusive authority to set interstate wholesale
 12 price rates. However, in the course of its decision the Supreme Court noted that:

13 While Maryland may retain *traditional state authority to regulate the development, location, and type of power plants within its borders...*the scope
 14 of Maryland's power is necessarily limited by FERC's exclusive authority to set
 15 wholesale energy and capacity prices.

16 Id. (emphasis added). The Court then held as follows:

17 Our holding is limited: We reject Maryland's program only because it disregards
 18 an interstate wholesale rate required by FERC. We therefore need not and do not
 19 address the permissibility of various other measures States might employ to
 20 encourage development of new or clean generation, including tax incentives,
 21 land grants, direct subsidies, construction of state-owned generation facilities,
 22 or re-regulation of the energy sector. Nothing in this opinion should be read to
 23 foreclose Maryland and other States from encouraging production of new or
 24 clean generation through measures "untethered to a generator's wholesale
 25 market participation."

26 In this case, there is a requirement, based upon Congressional enabling acts incorporated by
 27 Washington and its adoption of common law, that dams within the State not completely block

1 streams unless they are constructed in a manner that provides for fish passage. Doing so is
 2 consistent with the purposes of Congress embodied in 1986 amendments to the Federal Power
 3 Act. Washington's requirement cannot be held to be preempted by federal law, given the
 4 explicit savings clause which plainly appears in the text of the Federal Power Act, and the
 5 longstanding presumption against preemption.

6 There are only "a few areas, involving 'uniquely federal interests,... [that] are so
 7 committed by the Constitution and the laws of the United States to federal control that state law
 8 is pre-empted and replaced..." Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988). The
 9 police power of the State of Washington entitles it to prevent anadromous fish from going the
 10 way of the passenger pigeon. Puyallup Tribe v. Department of Game, 414 U.S. 44, 49 (1973).

11 6. Principles of Comity militate in favor of the Court abstaining from
entertaining respondents' motion to dismiss, as resolution of the issues raised
therein are best resolved by the State court, in determining the applicability
of the State's own laws.

13 The claims in plaintiff's complaint do not demonstrate Federal Questions so substantial as to
 14 merit the Court exercising jurisdiction to resolve respondents' motion to dismiss. The
 15 complaint seeks a declaratory judgement from a state court regarding the applicability of certain
 16 state laws to a public entity within the state. Federal courts do not have original jurisdiction,
 17 nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint
 18 for a state declaratory judgment. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667
 19 (1950). Our system of government is said to be one of "dual sovereignty." Murphy v.
 20 NCAA, 138 S. Ct. 1461 (2018). The founders believed that "the State governments may be
 21 regarded as constituent and essential parts of the federal government; whilst the latter is nowise
 22 essential to the operation or organization of the former." J. Madison, Federalist No. 4. As was
 23

1 stated in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431
2 (1982):

3 The notion of "comity" includes "a proper respect for state functions, a
4 recognition of the fact that the entire country is made up of a Union of separate
5 state governments, and a continuance of the belief that the National Government
will fare best if the States and their institutions are left free to perform their
separate functions in their separate ways.

6 In this case, the Superior Court of the State of Washington for Skagit County is an appropriate
7 forum for determining the applicability of provisions of Washington constitutional, legislative,
8 and common law such that, as a matter of comity, the court should abstain from entertaining
9 respondents' motion in deference to principles of federalism, rather than commandeering the
10 case. Just as was the case in Gully v. First National Bank in Meridian, 299 U.S. 109 (1936),

11 The most that one can say is that a question of federal law is lurking in the
12 background, just as farther in the background there lurks a question of
13 constitutional law, the question of state power in our federal form of
government. A dispute so doubtful and conjectural, so far removed from plain
necessity, is unavailing to extinguish the jurisdiction of the states.

14 *Id.*, 299 U.S. at 117.

15 CONCLUSION

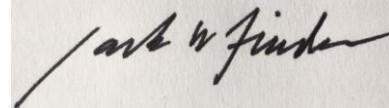
16 For the foregoing reasons, respondents' motion to dismiss should be denied.

17 DATED this 6th day of August, 2021.

18 Respectfully submitted,

19 SAUK-SUIATTLE INDIAN TRIBE
20 By:
21

22 S/Jack W. Fiander



23 _____
Jack W. Fiander

Certificate of Service

The undersigned certifies the foregoing was filed with the Clerk of Court with copies served upon all counsel of record utilizing the Court's CM/ECF system.

S/Jack W. Fiander

RESPONSE BRIEF - 16
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